Supreme Court, U. S.
FILED
JUL 16 1980
MICHAEL RODAK, JR., CLERK

NOs. 79-1969, 79-1972

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

ACKERLEY COMMUNICATIONS, INC., and
MARONCO, INC.,
Appellants,
v.
CITY OF SEATTLE and ALFRED PETTY,
Appellees.

DIAMOND PARKING INC.,
Appellant,
v.
CITY OF SEATTLE,
Appellees.

Upon Appeal from the Judgment of
THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS APPEALS

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Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of The United States, appellees move the Court to dismiss the appeals herein on the ground that the

decision from which these appeals are taken rests upon an adequate non-federal basis and upon the ground that these appeals do not present a substantial federal question.

STATEMENT

These are appeals from a decision of the Washington Supreme Court dismissing appellants' challenge to a City of Seattle ordinance regulating outdoor advertising signs along certain scenic routes within the City and requiring the removal of non-conforming signs along such routes after expiration of an amortization period. The facts underlying these appeals are as hereinafter set forth.

The ordinance in question, Seattle Ordinance 90138 as amended by Ordinance 97025 (effective September 5, 1968), is implemented by the designation of certain routes in the City as scenic or landscaped sections. On-premise business signs

visible from the designated sections and located within 660 feet thereof are subject to height and area limitations. Off-premise signs within 660 feet of, and visible from, designated sections and non-conforming on-premise signs are given a three year amortization period after which maintenance of such signs becomes unlawful unless an administrative variance or time extension has been obtained.

These regulations were enacted for the following specified purposes:

> Section 1. (Intent and Purposes) It is declared to be the purpose of this ordinance to implement the purpose and policy expressed by the Highway Advertising Control Act of the State of Washington in the regulation of outdoor advertising signs adjacent to certain public highways and this ordinance is hereby declared to be an exercise of police power of The City of Seattle to protect the public health, safety, welfare, convenience and the enjoyment of public travel, to attract visitors to this city and to conserve natural and man-made beauty by regulating the size and location of certain signs adjacent to certain

> designated freeways, expressways, parkways, and scenic routes within The City of Seattle, and this ordinance shall be liberally construed for the accomplishment of these purposes and is intended to be additional and supplemental to existing zoning and other laws regulating the size and location of signs.

The state Act to which the ordinance makes reference is the Highway Advertising Control Act of 1961, Chapter 96, Laws of 1961 (Chapter 47.42 RCW) which became effective March 11, 1961. Section 1 of the Highway Advertising Control Act declares the purpose of that law to be as follows:

> The control of signs in areas adjacent to state highways of this state is hereby declared to be necessary to promote the public health, safety, welfare, convenience and enjoyment of public travel, to protect the public investment in the interstate system and other state highways, and to attract visitors to this state by conserving the natural beauty of areas adjacent to the interstate system, and of scenic areas adjacent to state highways upon which they travel in great numbers, and to insure that information in the specific interest of the traveling public is presented safely and effectively.

The regulatory scheme by which the Highway Advertising Control Act of 1961 sought to achieve these objectives is nearly identical to that employed in the City's ordinance except that the state Act did not employ visibility as a criterion and did not provide for variances or time extensions. The constitutionality of the Highway Advertising Control Act of 1961 was affirmed in Markham Advertising Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1968), appeal dismissed, 393 U.S. 316, rehearing denied, 393 U.S. 112.

The first of these cases was commenced in 1974 under Washington's declaratory judgment statute (RCW 7.24) by the Foster and Kleiser Corporation and by Maronco, Inc., the owners of a building upon which one of Foster and Kleiser's roof mounted billboards is located. Neither Foster and Kleiser Corporation nor Maronco, Inc. had

sought to avoid application of the ordinance by seeking variances or time extensions. They nonetheless challenged the constitutionality of the City's ordinance as applied to a number of nonconforming Foster and Kleiser billboards along the Alaskan Way Viaduct, a scenic route designated by the ordinance that parallels the shorelines of Puget Sound through the heart of Seattle's downtown waterfront district and provides motorists some of the most scenic views in the City of the downtown skyline, Puget Sound, and the Olympic Mountains. All but ten of these billboards were removed during the pendency of this litigation for reasons unrelated to the City's ordinance.

In 1976, several years after the ten Alaskan Way Viaduct billboards still involved in this case had used up their amortization period and become illegal

under the City's ordinance, Appellant Ackerley Communications, Inc. purchased them and was substituted as a plaintiff in the case.

The case was then consolidated in the trial court with a similar action entitled Diamond Parking, Inc. v. City of Seattle, another declaratory judgment action commenced in 1975 by Appellant Diamond Parking, Inc. raising identical constitutional claims and challenging the ordinance as applied to one oversized on-premise oil station sign maintained by Diamond Parking, Inc. along the Alaskan Way Viaduct and two nonconforming Diamond billboards along Interstate Highway No. 5, which is also a scenic route protected by the ordinance running through the heart of the City's downtown central business district. Like appellants in the companion case, Diamond Parking, Inc. also failed to exhaust the

administrative remedies available to it under the challenged ordinance.

Following an unsuccessful motion in which appellees sought summary judgment on each issue raised by the appellants' pleadings, appellants moved for summary judgment on the basis of a newly enacted 1977 state law which contained a compensation provision (RCW 47.42.107). The trial court granted appellants' motion, declared the City's ordinance to be unconstitutional and in conflict with state law, and rejected appellees' contentions (1) that appellants' actions were barred as a matter of law by their failure to exhaust administrative remedies, (2) that the City's ordinance as a matter of law constitutes a valid land use regulation within the local police power that offends no constitutional or statutory right, and (3) that the retroactive application of the 1977 state

law compensation provisions to signs such as these that were already illegal and subject to immediate termination at no public expense would require a gratuitous expenditure of public funds in violation of Article 8, Section 5 of the Washington Constitution.

On appeal, the Washington Supreme Court concurred with each of appellees' above-cited contentions, reversed the trial court's summary judgment, and ordered dismissal of both actions.

ARGUMENT

1. Appellants' Failure to Exhaust Administrative Remedies Constitutes a Wholly Dispositive Independent State Law Ground For the Decision Below

All nine Justices of the Washington Supreme Court concurred in dismissing these consolidated actions because of appellants' failure to exhaust administrative remedies. This result is entirely consistent with

federal law which has long recognized the rule applied by the Washington Supreme Court here that one is barred from seeking judicial relief where administrative remedies that might have obviated the threatened injury have not been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Public Util. Comm'n. v. United States, 355 U.S. 534 (1958); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947).

Where the administrative remedy is established by state law, the scope and availability of the remedy is for the state courts to determine. Utlay v. St. Petersburg, 292 U.S. 106, 110 (1934). Similarly, where the challenged decision is based upon the appellant's failure to exhaust an adequate administrative remedy under a challenged state law as construed by the state court, the decision rests upon an

independent state ground broad enough to sustain it regardless of the federal rights asserted. Mellon v. McCafferty, 239 U.S. 134, 137 (1915).

These rules are directly applicable here and require dismissal of these appeals. Appellants concede nearly as much by first acknowledging that their failure to exhaust their administrative remedies "could have" provided an independent state law grounds for the Washington Supreme Court's dismissal of these actions and by then attempting to escape the consequence of their own admission by asserting that "the majority of that court, however, declined to dispose of this case on that basis . . ." Jurisdictional Statement of Ackerley Communications, Inc. and Maronco, Inc., pp. 9-10. This assertion of purported fact is simply contrary to the plain language and unequivocal holding of the Washington Supreme Court:

> We conclude, then that respondents are barred from maintaining a declaratory judgment action by the failure to pursue the administrative remedy available to them - a variance - which could have obviated any injury to them under the Ordinance.

Ackerley Communications, Inc. v. Seattle, 92 Wn.2d 905, 911, 602 P.2d 1127 (1979).

Appellees respectfully submit that this unanimous holding of the Washington Supreme Court clearly constitutes an adequate independent state ground that removes these cases from this Court's jurisdiction.

II. The Washington Supreme Court's Construction of 23 U.S.C. § 131, Raises No Substantial Federal Question

Appellant's reliance on the Highway Beautification Act of 1965, as amended, 23 U.S.C. § 131, as the source of a substantial federal question is wholly misplaced.

Appellants simply and totally ignore the underlying and legally dispositive fact that the federal act is not mandatory

and does not preempt either state or local law. The Washington Supreme Court expressly recognized this fact:

> We note first that the federal act (in 23 U.S.C. § 131(k), the state statute (in RCW 47.42.048 and .070), and the intergovernmental agreement (in Clause IV) all recognize and acknowledge the right of lesser governmental entities to enact regulations governing outdoor signs which are stricter than those imposed by the federal and state acts. Thus it is clear that the state and federal enactments have not preempted the field of regulation of outdoor advertising.

Ackerley Communications, Inc. v. Seattle, supra, at 92 Wn.2d 905. Other cases confirming the purely optional and non-preemptive nature of the federal act include Art Neon Company v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974); Donnelly Advertising Corp. v. City of Baltimore, 370 A.2d 1127 (Md. 1977); E.B. Elliott Advertising Co. v. Metropolitan Dace County, 425 F.2d 1141 (5th

Cir. 1970), cert. denied, 400 U.S. 805; Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935 (Tex. 1978), cert. denied, 62 L. Ed. 2d 42 (1979); Markham Advertising Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1968), appeal dismissed for lack of a substantial federal question, 393 U.S. 316, rehearing denied, 393 U.S. 1112 (1969); Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1973).

It is only by virtue of its non-preemptory nature that the Federal Highway Beautification Act has escaped successful challenge under the Tenth Amendment to the United States Constitution.

In Vermont v. Brineger, supra, at 379 F. Supp. 617, the court relied upon precisely these features of the federal act in rejecting a Tenth Amendment challenge by the State of Vermont which, pursuant to its

implementation statute and without compensation, had removed signs subject to the takedown provisions of the federal act:

> Clearly the 10 percent penalty is an inducement for the states to satisfy the requirements of the Highway Beautification Act of 1965, but we do not believe that the rights of a state reserved to it by the Tenth Amendment have been impermissibly invaded by this inducement. The dicta in Massachusetts v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1922) is appropriate in this regard:
>
> > If Congress enacted [the statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding. Id. at 482, 43 S. Ct. at 599.
>
> Therefore, we hold that the Highway Beautification Act of 1965 as we interpret it is not unconstitutional under the Tenth Amendment.

The above-cited cases confirm what the language of 23 U.S.C. § 131 makes clear. The federal act operates by inducing states to act, not by requiring them to do so. The federal act simply imposes no federal duty upon state or local governments to

make any payments whatsoever to billboard owners, let alone the gratuitous payments forbidden by Washington's Constitution to which appellants are claiming they are now entitled under 1978 amendments to the federal act. The federal act similarly confers no federal rights upon billboard owners to be paid for removing any billboards, let alone billboards such as these that became illegal and subject to immediate termination under validly enacted local land use regulation long before the passage of the 1978 federal amendments which the appellants seek to invoke.

Apart from the fact that appellants have no federally protected rights under the Act and therefore have no standing to invoke it, the issues they seek to raise concerning its scope are not ripe for determination. Pursuant to 23 U.S.C. § 131(l) (text set forth in Appendix "A"

hereto), the determination whether or not to withhold a percentage of an allegedly noncomplying state's allocated federal highway funds is committed to the initial discretion of the Secretary of the United States Department of Transportation. Prior to withholding any funds, the Secretary must give notice to the state of his determination and provide an administrative hearing. 23 U.S.C. § 131(1) further provides that an appeal of the administrative ruling may then be taken to the United States District Court. None of these steps has been taken here. Thus the "orderly implementation of the Act" would not be served by these appeals as appellants claim (Jurisdictional Statement of Ackerley Communications, Inc. and Maronco, Inc., p. 19) but would instead be circumvented and short circuited.

The California Supreme Court's decision upon reconsideration in Metromedia,

Inc. v. San Diego, 20 Cal. 3d 848, __ P.2d __, 164 Cal. Rptr. 510 (1980), does not undermine these conclusions or support appellants' claim that there is a substantial federal question here. Instead, the holding of the California Supreme Court from which appellants seek to manufacture an appealable question of federal statutory interpretation in these cases was clearly bottomed on state law and the fact that California's Outdoor Advertising Act, unlike Washington's statute, partially preempts local regulations:

> As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with federal law. (See 55 Ops. Cal. Atty. Gen. 1 (1972).) Analysis of the alleged preemptive effect of section 5412, consequently, requires a review of the provisions of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701).

Metromedia, Inc. v. San Diego, supra, at 164 Cal. Rptr. 524.

In these cases the Washington Supreme Court conclusively determined that Washington law does not preempt Seattle's ordinance and that appellants' claims to compensation for obeying it are barred by the Washington Constitution. These determinations constitute independent determinations of state law that clearly distinguish these cases from Metromedia, Inc. v. San Diego, supra, and leave no remnant of any material federal issue under 23 U.S.C. § 131.

Apart from these considerations, the interpretation of the Surface Transportation Act of 1978 amendments to 23 U.S.C. §§ 131(g) and (k) urged by appellants is devoid of legal merit and would raise no substantial federal question in any event. Appellees submit that this would be true even if the signs involved in these cases had been lawfully in existence when the

amendments that appellants seek to invoke were passed. These thirteen signs, however, became illegal and subject to immediate termination at no public expense between 1974 and 1975 under a Seattle ordinance enacted in 1968. Appellant Ackerley Communications, Inc. did not even purchase its billboards until 1976. Appellants' claim that the 1978 federal amendments require compensation to now be paid for such signs violates the fundamental rule of statutory construction that a law will not be given a retroactive effect imposing liabilities not existing at the time of its passage, particularly where no specific provision for retroactivity is present. As stated by this Court in Greene v. United States, 376 U.S. 149, 160 (1964):

> Thus the Government's argument necessarily requires that the 1960 regulation be given retroactive

> application. As the Court said in Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 58 L. Ed. 179, 182, 34 S. Ct. 101, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'." Since regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies and under the circumstances, it would be unjustifiable to give the 1960 regulation retroactive effect.

In addition to its other defects, appellants' interpretation of the 1978 amendments to 23 U.S.C. § 131 is in direct and unavoidable conflict with this "first rule" of statutory construction.

For these reasons, in addition to the adequate independent state law ground for dismissal arising from appellants' failure to exhaust administrative remedies, appellants' claims regarding 23 U.S.C. § 131

present no substantial federal question and should be dismissed.

III. The Washington Supreme Court Correctly Held That Seattle's Ordinance Does Not Abridge Freedom of Speech and This Determination Raises No Substantial Federal Question

Appellants' contentions regarding freedom of speech and due process of law are not supported by the law or by the facts in these cases. These contentions raise no substantial federal question under either the First or Fourteenth Amendments to the United States Constitution.

Appellants' free speech and due process arguments appear to rest at the outset upon the proposition that appellants' abstract invocation of the First Amendment rights of the advertisers who rent appellants' bilboards somehow immunized these cases from summary dismissal and converted the constitutionality of Seattle's ordinance from a question of law

into a disputed question of evidentiary fact requiring a trial. Appellants, however, cite no specific facts or relevant authority to support this proposition and make no attempt to explain how the application of Seattle's ordinance to thirteen of appellants' outdoor advertising signs along two designated scenic routes in the City of Seattle could conceivably cripple the outdoor advertising medium, let alone leave the City of Seattle without other adequate alternative channels of communication. Appellants' inability to support the sweeping assertions of purported fact upon which their First Amendment claims are based is simply the result of the uncontroverted evidence in these cases, not the result of any error in the procedure by which they were determined.

Appellants' First Amendment arguments also ignore the uncontroverted fact that

Seattle's ordinance is patterned after, and is expressly aimed at promoting the same public objectives as, the 1961 state highway outdoor advertising law upheld against a fundamentally identical First Amendment challenge in Markham Advertising Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1969), appeal dismissed for lack of a substantial federal question, 393 U.S. 316 (1969). Such a dismissal by this Court is viewed as a decision on the merits. Hicks v. Miranda, 422 U.S. 223 (1975). The only relevant differences between the City's ordinance and the 1961 state law upheld in Markham render the ordinance even more reasonable from the sign owners standpoint than the 1961 state law, since the ordinance affects far fewer routes and signs, regulates only signs that are visible to motorists on its designated routes, and provides for variances and time extensions.

The "commercial speech" cases upon which appellant rely in assailing the continued authority of Markham all involve content suppression and clearly permit time, place, and manner regulations such as Seattle's ordinance that are reasonably designed to achieve valid public purposes and leave alternative channels of communication open. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-771 (1976); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93, 94 (1977). As stated by the Texas Court in Lubbock Poster Co. v. City of Lubbock, supra, at 569 S.W.2d 945, distinguishing the ordinance banning residential "for sale" signs struck down in Willingboro from a zoning ordinance requiring the removal of 147 out of the plaintiff's 285 billboards in the City of Lubbock:

> By contrast, the Lubbock ordinance only seeks to regulate the time, place and manner of outdoor advertising rather than the content. Willingboro made clear that it was not condemning regulations of this kind. As a matter of law, the billboard section of the ordinance does not abridge the first amendment guarantee of freedom of speech.

The continued validity of Markham Advertising Co. v. State, supra, on the First Amendment issue and the lack of any substantial First Amendment question here is confirmed by recent decisions of this Court dismissing First Amendment challenges identical to those raised here in cases involving billboard statutes imposing more restrictive controls than those contained in Seattle's ordinance.

In Suffolk Outdoor Advertising Co., Inc. v. Hulse, 43 N.Y.2d 483, 373 N.W.2d 263 (1977), appeal dismissed for lack of a substantial federal question, 439 U.S. 808 (1978), a First Amendment challenge was rejected in a case involving an ordinance

requiring the removal of all nonaccessory (off-site) billboards in the Town of Southampton. The case was decided in the trial court on cross motions to dismiss.

In Modjeska Sign Studios v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255 (1977), appeal dismissed for want of a substantial federal question, 439 U.S. 809 (1978), a First Amendment challenge to a statute requiring the removal of all 96 of the plaintiff's outdoor advertising signs in the Catskill Park was rejected.

Similarly, in Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (1978), appeal dismissed for lack of substantial federal question, 440 U.S. 901 (1979), a North Dakota statute calling for the statewide removal of nonconforming signs along state highways was sustained as a reasonable time, place, and manner regulation that did not abridge First Amendment rights.

In Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835 (Colo. 1978), appeal dismissed for lack of a substantial federal question, 439 U.S. 809 (1978), a city-wide comprehensive sign code regulating signs visible from any public right-of-way was upheld. Although the trial court had entered summary judgment on the grounds that the plaintiff sign owners lacked standing to challenge the ordinance on First Amendment grounds, the Colorado Supreme Court affirmed on the merits, holding that the ordinance furthered a substantial governmental interest unrelated to the suppression of free expression, that any effect on First Amendment rights was only secondary and no greater than necessary to further the public safety and welfare, and that the ordinance was neither overly broad nor impermissably vague and

did not impose an unconstitutional prior restraint on free speech.

Also, on point is State v. Lotze, 92 Wn.2d 52, 593 P.2d 811 (1979), appeal dismissed for lack of a substantial federal question, 62 L. Ed. 2d 177 (1979), upholding Washington's Scenic Vistas Act of 1971 (RCW 47.42) against the First Amendment challenge of several sign owners despite the fact that the affected signs were used to convey the owners' personal political and social message that are within the core of the First Amendment's protection.

In addition to the other grounds for dismissal of these appeals set forth herein, the Washington Supreme Court's rejection of appellants' First Amendment challenge to Seattle's ordinance is fully in accordance with the prior decisions of this Court. Appellants respectfully submit that if no substantial First Amendment

question is raised by the billboard regulations in State v. Lotze, supra, Suffolk Outdoor Advertising Co. v. Hulse, supra, and the other above-cited cases, surely no such question in presented by these appeals.

CONCLUSION

For the foregoing reasons, appellees move that these appeals be dismissed.

DATED this 8th day of July, 1980.

Respectfully submitted,

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APPENDIX A

23 U.S.C. § 131(1)

* * *

(1) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a

written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the

Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

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